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IN THE SUPREME COURT OF ILLINOIS

IN VACATION AFTER JUNE TERM, A. D. 1940.

No. 25064

JOHN F. CORCORAN,
Plaintiff in Error,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Defendant in Error.

JURISDICTIONAL STATEMENT.

Pursuant to Rule 12, Paragraph 1, of the Supreme Court of the United States, appellant files this his statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

(a) The Federal Statute Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction is Title 28, U. S. C. A., "Section 344 (Judicial Code, Section 237, amended). Appellate Jurisdiction of decrees of State Courts; certiorari. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the

validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal." (United States Code, 1934 Edition, page 1271.)

(b) The State Statute the Validity of Which is Drawn in Question.

The validity of a statute of the State of Illinois is drawn in question in this case on the ground of its being repugnant to the Constitution and laws of the United States, and the decision of the Supreme Court of the State of Illinois, the highest court of that State in which a decision in the suit could be had, is in favor of its validity. Said statute is as follows:

> SECTION 92(3) a. "Any error of law affecting the judgment, decree or order appealed from may be brought up for review in any civil case.
>
> b. Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review in any civil case: Provided, that, except as to equitable issues, the Supreme Court shall re-examine cases brought to it by appeal from the Appellate Courts, as to questions of law only." (Civil Practice Act, in force January 1st, 1934. Illinois Revised Statutes, 1939, State Bar Association Edition, page 2441.)

We are questioning the validity of that part of this State statute that purports to give authority to the Appellate Court of Illinois (an intermediate court of review), to pass upon and re-examine questions of fact, which have been determined by a jury upon conflicting evidence, upon the

ground that the verdict of the jury and the judgment based thereon are against the weight of the evidence.

(c) The Date of Judgment Sought to be Reviewed.

The judgment of the Supreme Court of Illinois sought to be reviewed was entered by that court on April 10th, 1940, and appellant's petition for a rehearing of said cause in said Supreme Court of Illinois was denied by said court on the 5th day of June, 1940.

The application for appeal is presented by petitioner and appellant on the 22nd day of July, 1940.

(d) The Stage in the Proceedings When, and the Manner in Which, the Federal Questions Were Raised.

The first part of the opinion of the Supreme Court of Illinois points out and shows the nature of and the issues in the case; and the stage in the proceedings when the Federal questions now sought to be reviewed were raised, and that court holds that according to the practice of the State of Illinois this was done at the first opportunity and in apt time, and in the proper manner.

The opinion says:

"John F. Corcoran, plaintiff in error, referred to as plaintiff, began a suit in the superior court of Cook county against the city of Chicago, referred to as defendant, to recover damages for personal injuries alleged to have been caused by the negligent acts of the defendant. The cause was tried with a jury and resulted in a verdict for the plaintiff for $5,000. A motion for new trial was overruled and judgment entered on the verdict. On appeal, the Appellate Court for the First District reversed the judgment and remanded the cause for another trial. The plaintiff filed a motion in the Appellate Court asking that the remanding part of the order be stricken. The motion was supported by

affidavit that another trial would involve the same issues and that no additional or different evidence could be presented by the plaintiff. The motion was granted, and the case is here for review on a common-law writ of error. Defendant moved to dismiss the writ for want of jurisdiction, and such motion was taken with the case. A proper consideration of the motion, and the points urged for and against it, makes it necessary to state the error assigned by plaintiff on the merits.

"The negligence charged was that defendant had carelessly and negligently permitted certain streets to be and remain in an unsafe condition for travel, in that there were depressions, obstructions, holes and uneven places in the surface of the street which rendered it unsafe and dangerous to persons riding in or driving vehicles along the same, and that by reason of such conditions the automobile in which plaintiff was riding was overturned causing injuries to plaintiff. There was evidence which tended to prove the negligence charged but, on the other hand, there was evidence which, if true, showed the street to be in a reasonably good state of repair. The opinion of the Appellate Court is confined to a review of the evidence bearing upon the question of negligence. The evidence was conflicting. The Appellate Court found the verdict was against the manifest weight of the evidence and reversed the judgment for that reason.

"It is conceded the power which the Appellate Court assumed to exercise in reviewing the evidence and setting aside the verdict is found in section 92 (3b) of the Civil Practice Act (Ill. Rev. Stat. 1939, chap. 110, par. 216) which provides that Appellate Courts may review 'error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence.' Plaintiff's position is that such provision, as

applied to facts found by a jury upon conflicting evidence, as in the instant case, is unconstitutional, in that the findings of the Appellate Court deprive the successful party of the benefits of the verdict and take from him the right to a trial by jury as guaranteed by section 5 of article 2 of the Constitution.

"In support of defendant's motion to dismiss the writ it is urged (a) the remanding clause of the order of the Appellate Court was stricken on plaintiff's motion, and that without such part being stricken plaintiff had the right to another jury trial and can not now be heard to complain that he has been deprived of a jury trial for it was his action that induced the Appellate Court to change the order; (b) the validity of the statute was not raised in apt time; and (c) that this court will not pass on a point which was not submitted to the Appellate Court before it decided the case.

"The order of the Appellate Court as first entered was not final. Under it plaintiff had the right to have his case submitted to another jury but, as appears from the affidavit, he had no additional or different evidence and had he recovered a verdict on the second trial, on appeal he would have been confronted with the same defects in the record for which the Appellate Court reversed the first judgment. The striking of the remanding clause made the order final and appealable, and had the effect of depriving plaintiff of a right to another jury trial in the event the judgment of the Appellate Court is sustained. The procedure adopted has been followed in other cases in which this court took jurisdiction and disposed of the case on its merits (*Hartley* v. *Red Ball Transit Co.*, 344 Ill. 534, 176 N. E. 751; *Devine* v. *Pfaelzer*, 277 Ill. 255). Plaintiff's action in causing the remanding part of the order to be stricken does not, in itself, bar him from urging the invalidity of the statute under which the Appellate Court acted.

"Defendant's contentions that the validity of the statute was not raised in apt time, and that this court will not pass on a question which was not submitted to the Appellate Court before its decision, will be considered together. The validity of section 92 (3b) was raised for the first time in the Appellate Court on plaintiff's petition for rehearing. This was the first opportunity plaintiff had to question the validity of the Act for, prior to the filing of the opinion, he could not anticipate either affirmance or reversal or whether the power of the court would be exercised under section 92 (3b) for error of fact or under other provisions for error of law. Where the constitutionality of an act affecting the jurisdiction of the Appellate Court is first questioned in that court it has the authority to pass upon the validity of the act. * * * The right to review such question by common-law writ of error still exists. The motion to dismiss the writ of error is denied."

(e) The Method of Raising the Federal Questions in the State Court.

The questions were raised by a statement of errors in the Supreme Court of Illinois, in pursuance of rule 39 of that court (370 Ill. p. 44).

There is no longer in the State of Illinois in force the old rule, or the common-law rule, as to assignments of errors. In lieu of the old assignment of errors, rule 39 of the Illinois Supreme Court provides that in appellant's printed brief: "The concluding subdivision of the statement of the case shall be a brief statement of the errors or cross-errors relied upon for a reversal or of the cross-errors submitted by an appellee not prosecuting a cross-appeal. * * * The argument shall be confined to a discussion and elaboration of the points contained in the brief." There is no other assignment of errors required

in the courts of review of the State of Illinois, than "as required in rule 39" (Rule 36 (2)). For Rules of the Supreme Court of Illinois on this point, please see 370 Ill. pp. 13, 39 and 44.

Our brief in the Supreme Court of Illinois, at pages 8 and 9, complied with the Rules of that court, where the formal statement of errors relied upon for reversal is in part as follows:

"That provision of the Civil Practice Act namely: 'Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review in any civil case,' we maintain is invalid and unconstitutional when it is applied to a case in which a jury has rendered a verdict based on conflicting evidence, and the verdict approved by the trial judge.

"It is our contention that the case having been properly submitted to the jury, and the jury having found a verdict in favor of plaintiff, based upon sufficient evidence, and the trial judge who, as well as the jury, participated in the trial and saw the witnesses and heard them testify, having overruled the defendant's motion for a new trial, defendant's right to a review of the facts was exhausted, and the judgment as far as the facts are concerned is final."

In our argument in the same brief at page 42, we elaborate the formal statement of errors as is permitted by said rule 39, in regard to the Ordinance of 1787, as follows:

"The Ordinance of 1787.

"Section 14, Article 2, of the Ordinance of 1787, enacted by Congress under the Articles of Confederation, July 13, 1787, provided:

'It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as

articles of compact, between the original States and the people and States in said territory, and forever remain unalterable, unless by common consent, to-wit: * * *

'Article II. The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus* and of the trial by jury; of a proportionate representation of the people in the Legislature, and of *judicial proceedings according to the course of the common law.* * * * No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land.' (1 J. & A. Ann. Stats. Ill., p. 52.)

"These provisions of the ordinance of 1787 have been confirmed by Article Six, Sec. 1, of the Constitution of the United States and by the Act of Congress of August 7, 1789, after the adoption of the Federal Constitution, and by the Act of Congress of April 18, 1818, enabling the people of Illinois to form a constitution and State government, which provided that such constitution and State government, 'whenever formed, shall be republican, and *not repugnant to the ordinance of the 13th of July, 1787*, between the original States and the people and States of the territory northwest of the river Ohio,' and these provisions of the ordinance of 1787 were further confirmed and adopted by the people of Illinois in the first constitution. (Italics ours.)

"The Constitution of Illinois, 1818, provided: 'The People of the Illinois territory, having the right of admission into the general government as a member of the Union, consistent with the Constitution of the United States, *the Ordinance of Congress of 1787*, and the law of Congress, approved April 18, 1818'; and these provisions of the ordinance of 1787 were also recognized and adopted and continued in force by the Constitution of the State of Illinois, adopted in 1848 and in 1870.

"The facts in the instant case were determined by a jury who saw the witnesses and heard them testify in open court. It must be admitted that the evidence for plaintiff would fully have justified a verdict in the case. The Appellate Court, reading a printed abstract (prepared by defendant), of a typewritten record, has determined that the plaintiff's witnesses were not telling the truth, and that defendant's witnesses, wherein they contradicted plaintiff's witnesses, were telling the truth, and has rendered judgment against plaintiff, contrary to the verdict.

"A proceeding could hardly be imagined more repugnant to 'judicial proceedings according to the course of the common law.'

"We are not now making the argument that the Ordinance of 1787 is in itself still in force in the State of Illinois, although such an argument would have very solid foundations. Our contention is that the provisions of the Ordinance of 1787, in regard to the right of trial by jury, and of judicial proceedings according to the course of the common law, are embodied in the Constitution of 1818 and the subsequent constitutions of the State, and are a part of the fundamental law of the State. These provisions are of great importance in determining just what was meant by the framers of the Constitution of 1818, when they provided that 'the right of the trial by jury shall remain inviolate.'

"As bearing upon the argument we are now making it is very significant that the provision in the Ordinance of 1787 in regard to trial by jury is that the 'Inhabitants of the said territory shall always be entitled to the *benefits* of • • • the trial by jury.' (Ordinance of 1787, Section 14, Article II.)

"This means that the inhabitants of this State shall not only have the right to have a common law case tried by jury, but that also they should always be entitled to the

benefits resulting from such a trial. The greatest of these benefits, perhaps, is the permanency or finality of the verdict rendered by a jury.

"A verdict having been rendered by a jury, based upon conflicting evidence, and the trial judge, who, as well as the jurors, had participated in the trial and seen the witnesses and heard them testify, when called upon so to do had overruled a motion for a new trial and refused to set aside the verdict, the verdict, so far as questions of fact were concerned, had become absolutely final."

And at page 45 of our brief and argument, we elaborate the formal statement of errors in regard to the Seventh Amendment to the Federal Constitution, as follows:

"THE SEVENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

"While it is universally understood and conceded that the first ten amendments to the Federal constitution are restrictions only against action by the Federal government, the provisions of the seventh amendment are very important in the instant case in determining what was meant by the framers of the first constitution of Illinois in 1818 by the provision that, 'the right of trial by jury shall remain inviolate.'

"The Federal constitution was adopted in 1789 without any express provision concerning trial by jury in civil cases, but the constitution as originally adopted did provide that the Supreme Court of the United States should have 'appellate jurisdiction, both as to law and fact.' (U. S. Constitution, Art. III, Sec. 2.)

"This provision and this omission caused great opposition throughout the states, and especially the failure to provide for the right of trial by jury in civil cases (*Mirich* v. *Forschner Cont. Co.*, 312 Ill. 343, 355; *Parsons* v. *Bedford*, 3 Pet. 433, 446; *U. S.* v. *Wonson*, 1 Gallison, 3, 19). The

people generally demanded an amendment to the constitution to remedy these defects. Alexander Hamilton in The Federalist (ed. of 1871, pp. 595 and 611) while 'damning with faint praise' the right of trial by jury, argued vociferously that there was no necessity of any such amendment, and he even made the assertion that from the constitutional provision as originally adopted 'it does not follow, that the re-examination of a fact once ascertained by a jury, will be permitted in the Supreme Court.' (The Federalist, ed. 1871, p. 603.)

"But the seventh amendment was insisted upon by the people, in spite of these arguments, and was adopted the year after the original constitution went into force.

"We contend that the seventh amendment, without its last clause, effectually preserved the right of trial by jury in the Federal courts, including the very substantial and essential part of the right and benefits of a trial by jury which then existed, that the only modes by which a fact once tried by jury could be re-examined were by the granting of a new trial by the trial judge, or the award of a *venire facias de novo* by an appellate court for some *error of law* in the proceedings.

"The seventh amendment provides:

'In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.'

" 'The only modes known to the common law to re-examine such facts [facts tried by a jury] are the granting of a new trial by the court where the issue was tried or to which the record was properly returnable or the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceeding.' (*C. B. & Q. R. R. Co.* v. *Chicago,* 166 U. S. 226, 246; *Parsons* v. *Bedford,*

et al., 28 U. S. 433, 447; *The Justices* v. *Murray*, 76 U. S. 274, 277; *Insurance Company* v. *Comstock*, 83 U. S. 258, 259; *Crim* v. *Handley*, 94 U. S. 652, 657.)

"The sole reason for putting in the clause in the seventh amendment regarding the re-examination of facts tried by a jury, was that the Constitution, before the amendment, had given the U. S. Supreme Court 'appellate jurisdiction, both as to law and fact' (U. S. Const., Art. III, Sec. 2). This clause of the seventh amendment made it certain that *no* federal court should ever re-examine any fact tried by a jury, otherwise than according to the rules of the common law. And it is axiomatic that the Constitution of Illinois of 1818 applied the same prohibition to the courts of Illinois, when it provided 'That the right of trial by jury shall remain inviolate.' (Const. of 1818, Art. VIII, Sec. 6.) The right to trial by jury declared inviolate by the three successive constitutions of Illinois was the right as it existed at common law, and which included the substantial and essential attribute, that no fact determined by a jury and approved by the trial judge should ever be retried, except where the judgment was reversed by an appellate court for some *error of law.*

"Even if the limitation of the modes of re-examining facts in a case once tried by jury, as they existed at common law, was not an essential part of the right to trial by jury at common law (and there is no logical reason for holding that the method of review was not a very essential and substantial part of the right) it became an essential part of the right of trial by jury in the territorial possessions of the United States, a part of which in 1818 became the State of Illinois, upon the adoption of the Seventh Amendment to the Federal Constitution in 1790, and the right to trial by jury as it existed in the Northwest Territory in 1818 is the right to trial by jury declared to be inviolate by the Illinois Constitutions of 1818, 1848 and 1870."

We further elaborate our formal statement of errors, as to the effect of the Seventh Amendment upon the statute attacked by us in our reply brief at pages 43 to 45 as follows:

"THE SEVENTH AMENDMENT.

"In our original brief (pp. 45-51), we have made an argument concerning the Seventh Amendment to the Federal Constitution. As we there stated, it is not contended by us that the Seventh Amendment to the Federal Constitution is binding upon the State of Illinois as the first ten Amendments of the Constitution were intended only to put restrictions upon the power of the Federal Government. • • •

"However, we submit that the effect and terms of the Seventh Amendment are conclusive in this case.

"The right to trial by jury as it was adopted by the First Constitution of the State of Illinois in 1818, and retained in the subsequent constitutions of this state, is the right to trial by jury as it existed in the territory of Illinois at the time that territory was admitted into the union as a state.

"As this Court said in the *Sinopoli case* (316 Ill. p. 616) the right to trial by jury mentioned in the Constitution of 1818 'Referred to the right of trial by jury as it existed at the time that Constitution was adopted in the Territory of Illinois.'

"The Seventh Amendment to the Federal Constitution was in force as a part of the law of the territory of Illinois from the time of the adoption of the Seventh Amendment in 1791 until the admission of the territory as a state, including the provision of the Seventh Amendment that 'No fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.' This provision of the Seventh Amendment which was governing law in the territory of Illinois was a part of

the right of trial by jury the violation of which was forbidden by each of the constitutions of the State of Illinois.

"That the provisions of the Federal Constitution relating to trial by jury are a part of the law of the organized territories of the United States has been settled beyond all controversy by the decisions of the United States Supreme Court.

"In *Springville* v. *Thomas*, 166 U. S. 707, decided in 1897, the Court holds that the Seventh Amendment to the Constitution was a part of the Law of the territory of Utah prior to the time that territory was admitted as a state, and that neither by a territorial statute nor by any act of Congress could the law as laid down in the Seventh Amendment be changed in the territory of Utah.

"In the *Springville case*, the Court says at page 707:

'In these three cases judgments were entered on verdicts returned by less than the whole number of jurors, by which they were tried. It has been decided by this court that the territorial act of March 10, 1892, permitting this to be done, Laws Utah, 1892, p. 46, was invalid, because in contravention of the Seventh Amendment to the Constitution and the act of Congress of April 7, 1874, 18 Stat. 27, c. 80. *American Publishing Co.* v. *Fisher, ante*, 464. • • •

'In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so.'

"The seventh amendment to the Federal Constitution was in force in the territory of Iowa, before Iowa's admission as a state (*Webster* v. *Reid*, 11 Howard (52 U. S.) 436, 460).

"In *Thompson* v. *Utah*, 170 U. S. 343, the U. S. Supreme Court says at p. 346:

'That the provisions of the Constitution of the United States relating to the right of trial by jury in suits at common law apply to the Territories of the United States is no longer an open question.'

"In *Rasmussen* v. *U. S.*, 197 U. S. 516, the United States Supreme Court held that the provisions of the Sixth Amendment to the Federal Constitution relating to the right of trial by jury extended to the Territory of Alaska."

In answer to our contentions concerning the Ordinance of 1787 and other Federal laws, and concerning the Seventh Amendment to the Federal constitution, counsel for the City of Chicago, in their brief in the Supreme Court of Illinois, say at p. 42:

"Plaintiff's discussion of the Ordinance of 1787, at page 42 *et seq.*, concludes with the assertion that the Appellate Court has deprived the verdict of a finality which it possessed and which was guaranteed by the Ordinance of 1787 and the Illinois Constitutions. The same argument was advanced in the case of *State ex rel. Cartmel* v. *A. C. & S. Co., et al.*, 84 Fla. 123, 92 S. 871, cited by us under our Point II D. The argument was rejected. • • •

"The same statement answers plaintiff's argument relating to the Seventh Amendment to the Federal Constitution. Concededly, the rules of the common law apply to the right to trial by jury guaranteed by that amendment and by the successive Constitutions of this state. Plaintiff differs with us only in his failure to recognize, as we have pointed out, that the court to which the record was returnable could set aside the verdict and grant a new trial."

(f) The Way in Which the Federal Questions Were Passed Upon by the Supreme Court of Illinois.

THE RULINGS OF THE SUPREME COURT OF ILLINOIS WERE SUCH AS TO BRING THE CASE WITHIN THE JURISDICTIONAL PROVISIONS.

The issues on the Federal questions were made in the Supreme Court of Illinois, by our claims above pointed out that the part of the statute of Illinois in question was repugnant to the Constitution and laws of the United States, and by the denial above quoted, of such claims by counsel for defendant.

The Supreme Court of Illinois, at considerable length in its opinion discussed the validity of the statute in question, and finally held that the statute was not invalid, and did not violate appellant's right to trial by jury. But that court did not see fit, in its opinion, specifically to mention our claim and contentions, that the statute was repugnant to the Constitution and laws of the United States. The failure or neglect of the Illinois Supreme Court specifically to mention the Federal question in its opinion, cannot bar our right to present the question to the Supreme Court of the United States, where by the judgment of the State court, the right claimed was denied.

C. B. & Q. R. R. Co. v. *Chicago,* 166 U. S. 226, 231;
Bryant v. *Zimmerman,* 278 U. S. 63, 67;
Sully v. *American Nat. Bk.,* 178 U. S. 290, 298.

(g) The Ordinance of 1787 is Still a Law of the United States, and has the Force of Law in the State of Illinois.

It was enacted by the Congress under the articles of confederation on July 13, 1787; it was confirmed by Congress *after the adoption of the Constitution,* August 7, 1789; in the official United States Code, 1934 edition, page XXIII,

the Ordinance of 1787 is set out as one of the "Organic laws of the United States of America"; by Title 1, Section 54 (a) of that code, it is provided that all matter set forth in the code shall establish *prima facie* the laws of the United States.

The Supreme Court of Illinois has a number of times recognized the Ordinance of 1787 as having the force of law in the State of Illinois, after it was admitted as a State. *Phoebe* v. *Jay*, 1 Ill. 268; *Sinopoli* v. *Chicago Rys. Co.*, 316 Ill. 609, 616; *People* v. *Callopy*, 358 Ill. 11, 16.

The Supreme Court of the United States has held the same in many cases.

In *Beeson* v. *Johns*, 124 U. S. 56, decided in 1888, a writ of error was sued out from the U. S. Supreme Court based solely on the grounds that a statute of the State of Iowa, concerning taxation, was repugnant to a provision of the Ordinance of 1787, and to the Act of Congress of March 3, 1845, providing for the admission of Iowa into the Union. The provision of the Ordinance of 1787 was one contained in Section 14, Art. IV, which is one of the articles on an equal footing with the provisions of the Ordinance providing the inhabitants of the territory shall always be entitled to the benefits of trial by jury, and of judicial proceedings according to the course of the common law, of which we claim the benefit in the instant case, and which are declared to be articles of compact unalterable, forever unless by common consent.

The U. S. Supreme Court took jurisdiction in the case and gave full consideration to the question of whether or not the State statute involved in that case was repugnant to the Ordinance of 1787 and the law of Congress of March 3rd, 1845.

The U. S. Supreme Court says at p. 58:

"It is in regard to these last two charges in the amended petition that the plaintiff in error claims a right to bring the

case to this court. That right he bases in his brief, first, upon a provision of the Ordinance of 1787, to the effect that in no case shall non-resident proprietors be taxed higher than residents, and also to a similar provision contained in the act of Congress of March 3, 1845, providing for the admission of the States of Iowa and Florida into the Union.

"As the case was decided against the right set up by the plaintiffs in error under this act of Congress, we must inquire whether the decision of the Supreme Court of the state on that subject is sound."

The *Beeson* case just cited is exactly parallel to the instant case, with the single exception, that in our case we have the advantage that the State statute being questioned is a statute of the State of Illinois, one of the five States carved out of the Northwest Territory, with which State and its people, the original compact of the Ordinance of 1787 was made, while in the *Beeson* case, the court treated the territory and State of Iowa, as though it had been a party to the original compact, although it was not.

In *Economy Light Co.* v. *United States,* 256 U. S. 113, decided in 1921, the U. S. Supreme Court held that the part of Article 4 of the Ordinance of 1787 relating to navigable waters still had the force of law in the State of Illinois. The Court says at page 119:

"By Article 4 of the compact in the Ordinance of July 13, 1787, for the government of the territory northwest of the river Ohio, it was declared: 'The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.' 1 Stat. 51, 52, note; Rev. Stats. U. S., 1878 ed., pp. 13, 16. This was under

the Confederation; but the first Congress under the new Constitution expressed a design to have it continue in full effect, in the Act of August 7, 1789, c. 8, 1 Stat. 50."

As late as 1926 Mr. Justice Butler of the U. S. Supreme Court, sitting as Circuit Justice in the Circuit Court of Appeals for the Seventh Circuit, in *United States* v. *Motlow, et al.*, 10 F. (2d) 657, held in effect that the provisions of Article 2 of the Ordinance of 1787 were still in effect in the State of Indiana, which as well as the State of Illinois, was a part of the Northwest Territory. The Court says at page 659:

"The Ordinance of 1787 declares that: 'All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great.' Article 2."

The Supreme Court of the United States has cited and considered the Ordinance of 1787 on many occasions, sometimes in cases which originated in the five States formed from the original Northwest Territory, and more often in cases originating in other states and territories to which the provisions of the Ordinance of 1787 were extended by different Acts of Congress. These decisions cannot all be reconciled, but it is safe to say that the individual rights guaranteed to the people of the States formed from the original Northwest Territory, have never been denied to them by a considered opinion of the Supreme Court of the United States. After an examination of the cases, the Supreme Court of the United States now ought to render a considered opinion holding that the Ordinance of 1787, as regards the trial by jury, still has the force of law in the State of Illinois.

(h) The Grounds Upon Which it is Contended the Questions Involved are Substantial.

Among these grounds is that the State statute has never before been attacked for the reasons, now raised by us. In its opinion in the instant case the Supreme Court of Illinois says: "Neither the act of 1837, nor any of the succeeding acts, have been challenged on constitutional grounds such as are raised against the present act in the instant case."

As one of the things showing that this case involves a substantial Federal question, we wish to call the attention of the Court to what we believe is the fact, that was are presenting in this case a new Federal question, and one that has never been passed upon by the Supreme Court of the United States, viz: What is the effect of the Seventh Amendment, and of the Ordinance of 1787, as it was confirmed by Congress in 1789, upon the right to trial by jury in the States carved out of the Northwest Territory, and which were organized territories in which the Seventh Amendment applied as binding law, prior to their admission to the Union as States?

The Federal question here involved is substantial not only because the United States Supreme Court has never heretofore considered the question; not only because the Supreme Court of Illinois found that in over a hundred years the constitutional question had never before been raised in the Supreme Court of Illinois; but also, because a decision of this case, vitally affects the practice and procedure on appeal in literally dozens of cases decided on appeal every year in the State of Illinois.

As we pointed out in our briefs in the Supreme Court of Illinois, a survey of the cases decided by the Illinois Appellate Courts in the first six months of 1938 and the last

six months of 1939, shows that in these two periods, aggregating twelve months, in cases passed upon by said Appellate Courts, which had been tried before juries and verdicts and judgments for plaintiffs rendered on conflicting evidence, the verdicts and judgments in 28 cases were interferred with by the Appellate courts *on questions of fact,* and in only 56 cases were the judgments affirmed.

By the statute in question, the legislature of the State of Illinois has undertaken to transfer the trial of questions of fact from a jury of 12 men, to an appellate tribunal consisting of three judges, who do not see the witnesses or hear them testify, but who sit behind closed doors and examine a printed abstract, prepared by the losing party, of a typewritten record, and these three judges substitute their judgment, on questions of fact, for that of the judgment of the jury. This statute as applied in the instant case, in effect, destroys completely the substance of the right of trial by jury and leaves only its hollow shell.

We submit that, in its opinion, the Supreme Court of Illinois erred in holding that at common law any English court ever set aside a verdict of a jury as being against the weight of the evidence, except with the concurrence of the judge, or judges, who sat with the jury.

And the Supreme Court of Illinois likewise erred in holding that at common law an appellate court ever had the right to, or ever did, set aside the verdict of a jury, based on conflicting evidence, as being against the weight of the evidence.

The above holdings of the Illinois Supreme Court are not only erroneous, but they are not controlling, as its opinion might lead one to believe, because the right to trial by jury, to which the people of Illinois are entitled to-day, is the right as it existed in the Territory of Illinois in 1818, and that right forbade the review by an appellate court of any fact tried by a jury.

Wherefore, appellant respectfully submits that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in this case.

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Attorneys for Appellant.

EXHIBIT "A".

Opinion of Appellate Court of Illinois, First District.

(Filed Oct. 10, 1938; Petition by Appellee for Rehearing Denied Oct. 24, 1938. 296 Ill. App. 645; 16 N. E. 2d. 922, abstract decision only.)

39828.

JOHN F. CORCORAN, *Appellee*,

vs.

CITY OF CHICAGO, a Municipal Corporation, Appellant.

Appeal From Superior Court of Cook County.

Mr. Presiding Justice McSurely delivered the opinion of the court.

Plaintiff, with six other young men, was going southward on Western avenue in Chicago in an automobile on the evening of October 12, 1929; as they were crossing 57th street and attempting to pass another automobile in front, the automobile in which they were riding was overturned and caught fire and plaintiff was severely burned; he brought suit, alleging that the accident was caused by the negligence of defendant in suffering the street at this point to have depressions and uneven places, rendering it unsafe and dangerous to persons driving vehicles upon it; upon trial by a jury he had a verdict for $5000; defendant appeals from the judgment for this amount.

Plaintiff at the time of the accident was about 20 years old; he with six others got into an old 1923 model five passenger Studebaker automobile owned and driven by Harold Phillips; they proceeded southward on Western avenue toward intersecting 57th street at a rate of speed which plaintiff and his friends testified was from 25 to 35 miles an hour; there was evidence that the boys had been drinking whiskey and wine; plaintiff was sitting on the front seat between Phillips and George Tyrrell; the other

four occupants sat in the rear seat; there was a can of gasoline on the floor in the back which was used to pour into the vacuum tank in the front of the car, as the fuel line was apparently blocked; they approached 57th street driving in the street car tracks; there was an automobile in front of them and Phillips turned out to the right to pass it.

Defendant claims that plaintiff failed to prove by a preponderance of the evidence that there was any bump, obstruction or depression in the street which caused the accident, and this is the decisive question in the case.

John Devaney, who was riding in the rear seat of the car, testified that as their car turned out to pass the other it "struck the bump just past the middle of the intersection of 57th and Western—the southwest corner." The car turned over and caught fire and plaintiff was burned. This witness described the obstruction as a "bump in the street." An inquest was held on Arthur Corcoran, one of the party, who came to his death through the accident. Witness Devaney testified that at the inquest he explained the accident thus: "Well, the way the accident happened, to my knowledge, there was a car going south in the carline; Phillips swung out to the right to pass it and he was just about to pass the car when he noticed a car close right passing him—it was very close. He had to cut this other car short—this car going south on the car line. When he cut it short there was so much play in the wheel—well, he just went straight east—I think it was to the southeast and then he tried to swerve or straighten the wheels up. It kept swaying from side to side, that's the way it tipped."

Edward Haas testified that he was riding in the car and that it seemed "like it hit that bump." Another occupant, Gosselin, testified that when their car turned to pass the forward car it hit a hole and Phillips lost control of it. At the inquest he testified that the car in front swung in front of them and that when Phillips saw that he gave a quick turn to the wheel, "intending to pass this fellow up after he saw him swing. He did not have much chance after that, he swung and in order to save from hitting him. I suppose he lost control when he swung and then back again. He turned back again and I guess he lost control of the machine." Plaintiff Corcoran testified that the car got

an awful jerk. Joseph Langlois, testifying for plaintiff, said he was in the habit of crossing along that point in the street about five times a week; that there was a depression on the west side of the car track just south of the center line of 57th street about two or three feet from the Western car line "about six inches deep and about a foot wide."

Widmaier had a barbecue stand nearby and testified that there were several holes a little bit west of the street car tracks on the south side of 57th street.

Vincent Cooney testified for plaintiff that there was a bump in the middle of 57th and Western and a nine or ten inch depression about two feet wide running north and south and about a foot east and west. His wife also testified that there was a bump on the west side of Western avenue; and Eleanor Stillwell testified there had been holes there—"right in the middle was a big slope."

It should be noted that plaintiff's witnesses did not agree as to the location of the so-called bump or depression, and the testimony that there was a depression six or nine inches and a foot wide is manifestly an error as shown by the photographs. Mr. and Mrs. Cooney placed the depression or bump "right in the middle of 57th and Western." Widmaier places the holes west of the street car tracks and south of 57th street. Langlois placed the depression on the west side of the car tracks just south of the center line of 57th street. Plaintiff's witnesses who testified at the inquest changed their story at the trial.

Opposed to this defendant introduced photographs of the street at the place of the accident. These were taken three days after the accident, and questioned about them plaintiff's witnesses said that they show correctly the condition of the street at the time of the accident. Inspection of the photographs which are in the record fails to show any of the bumps, obstructions or depressions in the street pavement to which plaintiff's witnesses testified. The streets at this point are paved with granite bricks, with tar poured into the interstices. The photographs give the impression of a well paved and reasonably smooth surfaced street.

Michael Normoyle, working in the coroner's office at the time of the accident, testified that he examined the place the

day after the accident and saw no depression, holes or ridges there.

Morris Ritter, an attorney at law, traveled over this street intersection five or six years twice a day, sometimes riding in an automobile, and for some time prior to the date of the accident he had noted the condition of the pavement there and that it "was good", perhaps a little wavy between the north and south curb lines; there were no holes.

Leo Jader, a salesman living five or six blocks from the place in question, drove his automobile over the intersection about twice a day prior to and for a month or so after the accident; he testified that there were no holes there and that it was a new street at that time. On cross-examination he stated that the street at 57th and Western "was in wonderful condition;" that farther south on Western it was slightly wavy in order to let water run into the sewers, and that at the cross-walk the construction of the street was slightly higher; that there were no holes at any place near the street car track at 57th street.

Daniel Lynch, a police captain, examined the place the day following the accident; he testified that there were no holes there; that there was a slight depression of about an inch, eight or ten inches outside of the west curb of the southbound track; that he went over the place thoroughly.

William Kilbourne, a police officer, traveled that beat on foot, crossing 57th and Western, going both north and south; he testified that there were no holes in any part of the street there; on cross-examination he stated that the street was paved with granite brick, filled in with tar; that there were no holes, just a wave or two—not enough to jar a person in an automobile; that he had driven over that point at 55 and 60 miles an hour without being jarred; that the cross sections where pedestrians cross are a few inches higher but level down to the street about two feet from the curb.

John Ashley, police officer, testified that there were no holes or depressions anywhere in the pavement in question. To the same effect was the testimony of Leo Loesch, who said he knew this location well and there were no holes in the pavement. The witnesses for defendant testified that the photographs represented the true and accurate condition of the pavement at the time and shortly after the accident.

Considering the testimony of all the witnesses, together with inspection of the photographs in the record, leads to the conclusion that the verdict of the jury is manifestly against the weight of the evidence.

A city is not bound under the law to keep its streets absolutely safe. Ordinarily, obstructions or defects in the street to make the city liable must be of such a nature that they are in themselves dangerous, and the duty cast upon the city is that it shall maintain the respective portions of the street in a reasonably safe condition. *Boender* v. *City of Harvey*, 251 Ill. 228, 231.

For the reasons indicated the judgment is reversed and the cause is remanded.

Reversed and Remanded.

Matchett and O'Connor, JJ., concur.

EXHIBIT "B".

Opinion of Supreme Court of Illinois.

(Reported in 373 Ill. 567, Advance Sheets; 27 N. E. 2d. 451.)

(No. 25064—Judgment Affirmed.)

JOHN F. CORCORAN, *Plaintiff in Error,*

vs.

THE CITY OF CHICAGO, *Defendant in Error.*

Opinion Filed April 10, 1940—Rehearing Denied June 5, 1940.

1. Negligence—*when Supreme Court may, by writ of error to Appellate Court, review constitutional question.* Where the Appellate Court reverses a judgment for the plaintiff and remands the cause for a new trial, its judgment is not final, but where the plaintiff moves to strike the remanding order because he has no further evidence to produce on another trial, the striking of such portion of the order makes the judgment final, and the Supreme Court may, by writ of error, review the question whether the action of the Appellate Court in setting aside the verdict in such

case deprives the plaintiff of a jury trial, and the plaintiff's action in causing the remanding order to be stricken does not bar him from raising the question.

2. Appeals and Errors—*when Appellate Court may pass on validity of statute.* Where the constitutionality of an act affecting the jurisdiction of the Appellate Court is first questioned in that court is has the authority to pass upon the validity of the act, and the Supreme Court will review the question although it was raised for the first time, and at the party's first opportunity, on petition for rehearing in the Appellate Court.

3. Constitutional Law—*statute allowing Appellate Court to set aside verdict is not invalid.* The provision of section 92(3b) of the Civil Practice act giving the Appellate Court authority to review the evidence and set aside a verdict is not invalid as depriving a plaintiff of the right to a jury trial in a case where a verdict for the plaintiff is set aside and the remanding order is stricken on the plaintiff's motion because he is unable to produce any further evidence on another trial.

Writ of Error to the First Division of the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. William P. Boynton, Judge, presiding.

Charles C. Spencer, and Richard M. Spencer, for plaintiff in error.

Barnet Hodes, Corporation Counsel, (Alexander J. Resa, J. Herzl Segal, L. Louis Karton, and Sydney R. Drebin, of counsel), for defendant in error.

Mr. Justice Murphy delivered the opinion of the court:

John F. Corcoran, plaintiff in error, referred to as plaintiff, began a suit in the superior court of Cook county against the city of Chicago, referred to as defendant, to recover damages for personal injuries alleged to have been caused by the negligent acts of the defendant. The cause was tried with a jury and resulted in a verdict for the plaintiff for $5000. A motion for new trial was overruled and

judgment entered on the verdict. On appeal, the Appellate Court for the First District reversed the judgment and remanded the cause for another trial. The plaintiff filed a motion in the Appellate Court asking that the remanding part of the order be stricken. The motion was supported by affidavit that another trial would involve the same issues and that no additional or different evidence could be presented by the plaintiff. The motion was granted, and the case is here for review on a common law writ of error. Defendant moved to dismiss the writ for want of jurisdiction, and such motion was taken with the case. A proper consideration of the motion, and the points urged for and against it, makes it necessary to state the error assigned by plaintiff on the merits.

The negligence charged was that defendant had carelessly and negligently permitted certain streets to be and remain in an unsafe condition for travel in that there were depressions, obstructions, holes and uneven places in the surface of the street which rendered it unsafe and dangerous to persons riding in or driving vehicles along the same, and that by reason of such conditions the automobile in which plaintiff was riding was overturned causing injuries to plaintiff. There was evidence which tended to prove the negligence charged but, on the other hand, there was evidence which, if true, showed the street to be in a reasonably good state of repair. The opinion of the Appellate Court is confined to a review of the evidence bearing upon the question of negligence. The evidence was conflicting. The Appellate Court found the verdict was against the manifest weight of the evidence and reversed the judgment for that reason.

It is conceded the power which the Appellate Court assumed to exercise in reviewing the evidence and setting aside the verdict is found in section 92(3b) of the Civil Practice Act, (Ill. Rev. Stat. 1939, chap. 110, par. 216) which provides that Appellate Courts may review "error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence." Plaintiff's position is that such provision, as applied to facts found by a jury upon conflicting evidence, as in the instant case, is unconstitutional, in that

the findings of the Appellate Court deprive the successful party of the benefits of the verdict and take from him the right to a trial by jury as guaranteed by section 5 of article 2 of the constitution.

In support of defendant's motion to dismiss the writ it is urged (a) the remanding clause of the order of the Appellate Court was stricken on plaintiff's motion, and that without such part being stricken plaintiff had the right to another jury trial and cannot now be heard to complain that he has been deprived of a jury trial, for it was his action that induced the Appellate Court to change the order; (b) the validity of the statute was not raised in apt time, and (c) that this court will not pass on a point which was not submitted to the Appellate Court before it decided the case.

The order of the Appellate Court as first entered was not final. Under it plaintiff had the right to have his case submitted to another jury but, as appears from the affidavit, he had no additional or different evidence and had he recovered a verdict on the second trial, on appeal he would have been confronted with the same defects in the record for which the Appellate Court reversed the first judgment.

The striking of the remanding clause made the order final and appealable, and had the effect of depriving plaintiff of a right to another jury trial in the event the judgment of the Appellate Court is sustained. The procedure adopted has been followed in other cases in which this court took jurisdiction and disposed of the case on its merits. (Hartley *v.* Red Ball Transit Co., 344 Ill. 534; Devine *v.* Pfaelzer, 277 Ill. 255.) Plaintiff's action in causing the remanding part of the order to be stricken does not, in itself, bar him from urging the invalidity of the statute under which the Appellate Court acted.

Defendant's contentions that the validity of the statute was not raised in apt time, and that this court will not pass on a question which was not submitted to the Appellate Court before its decision, will be considered together. The validity of section 92(3b) was raised for the first time in the Appellate Court on plaintiff's petition for rehearing. This was the first opportunity plaintiff had to question the validity of the act for, prior to the filing of the opinion,

he could not anticipate either affirmance or reversal or whether the power of the court would be exercised under section 92(3b) for error of fact or under other provisions for error law. Where the constitutionality of an act affecting the jurisdiction of the Appellate Court is first questioned in that court it has the authority to pass upon the validity of the act. Bagdonas *v.* Liberty Land and Investment Co., 309 Ill. 103.

Section II of article 6 of the constitution provides for the creation of inferior Appellate Courts of uniform organization and jurisdiction, upon which jurisdiction may be conferred and from which appeals and writs of error shall lie to this court in all criminal cases and cases in which a franchise or freehold or the validity of a statute is involved, and in such other cases as may be provided by law. By sub-paragraph 2 of section 75 of the Civil Practice act, (Ill. Rev. Stat. 1939, chap. 110, par. 199) the General Assembly has made provision for this court to review the judgments and decrees of the Appellate Court in certain cases, but excepted those cases wherein appeals are specifically required by the constitution to be allowed from the Appellate Court to the Supreme Court. In Bagdonas *v.* Liberty Land and Investment Co., *supra*, it was held that this court acquires its jurisdiction to review judgments of the Appellate Court in cases where the validity of a statute is involved, by virtue of this constitutional provision and not by the Practice act.

That part of sub-paragraph 2 of section 75 referred to is substantially the same as section 121 of the Practice act of 1907. The difference between the two provisions is, the act of 1907 excepted those cases wherein "appeals and writs of error" were specifically required by the constitution to be taken from the Appellate Court to this court, while the present act excepts cases wherein "appeals" are required. Under the act of 1907 it was held that no method of review by appeal had been provided in a case where the validity of a statute was first raised in the Appellate Court, but that the constitutional question could be reviewed in this court on a common law writ of error. (Sixby *v.* Chicago City Railway Co., 260 Ill. 478.) The omission of the

words "and writs of error" in the present act does not change the rule which prevailed prior to the adoption of the Civil Practice act. The right to review such question by common law writ of error still exists. The motion to dismiss the writ of error is denied.

Prior to 1837, the law of this State was that the granting or refusal of a motion for a new trial rested in the sound discretion of the trial court and the ruling thereon could not be urged as error in the court of review. (Harmison *v.* Clark, 1 Scam. 131; Sawyer *v.* Stephenson, Breese 24; Street *v.* Blue, id. 261; Adams *v.* Smith, id. 283; Vernon, Blake & Co. *v.* May, id. 294; Littleton *v.* Moses, id. 393.) In 1837, an act was passed which provided "exceptions taken to opinions or decisions of circuit court overruling motions in arrest of judgment, motions for new trials and for continuance of causes shall hereafter be allowed and the party excepting may assign for error any opinion so excepted to, any usage to the contrary notwithstanding." The substance of the act of 1837 was reenacted as section 23 of chapter 83 of the Practice act of 1845 (Rev. Stat. 1845, p. 416) and in the form then adopted became section 83 of the Practice act of 1907, (Smith-Hurd Stat. 1931, chap. 110,) and paragraph 3b of section 92 of the present act is, in effect, the same as the prior enactments, so that the section in question has been the statutory law of this State since 1837.

Neither the act of 1837, nor any of the succeeding acts, have been challenged on constitutional grounds such as are raised against the present act in the instant case. In Smith *v.* Schultz, 1 Scam. 490 (1838), in considering an error assigned on the court's ruling on a motion for new trial it was said: "At common law, the decision of a court upon an application addressed to its discretion, can not be assigned for error, and such has been the uniform decision of this court. But by an act of the legislature, this principal of law has been changed, and an appeal will now lie from the decision of a court refusing an application for a new trial." After the passage of the 1837 act this court, in several cases, considered the statute as vesting it with power to review the evidence on assignment of error of fact

and, in at least two cases, verdicts were set aside as being against the manifest weight of evidence. In *Keaggy* v. *Hite*, 12 Ill. 99, (1850) the jury returned a verdict for the plaintiff. In reviewing error assigned on the overruling of a motion for new trial the court said: "How the jury, with this evidence before them, could return the verdict they did is matter of surprise. The testimony as it appears in the record, preponderates altogether in favor of the appellant, and though this court is reluctant to set aside a verdict as contrary to evidence, which the judge who presided at the trial had refused to disturb, yet when the record discloses a case in which the jury have found so manifestly against the evidence as in this instance, it would be doing injustice to permit their verdict to stand." In *Higgins* v. *Lee*, 16 Ill. 495, (1855), it was said that a new trial should have been granted for the reason that the verdict failed to do substantial justice.

The effect of the operation of the statute was considered in *Chicago and Rock Island Railroad Co.* v. *McKean*, 40 Ill. 218, a case where the trial court had overruled a motion for new trial and error was assigned on such ruling. Mr. Justice Breese, speaking for the court, said: "This brings before us all the evidence in the case, and on the force to which it is entitled, we are required to pronounce. By the common law and the practice under it which prevailed for ages, the refusal to grant a new trial could not be assigned as error. Such was the law and the practice in this State up to 1837, when the legislature, in its wisdom, declared by an act of July 21, of that year, that exceptions taken to opinions or decisions of the circuit courts overruling motions for new trial should be allowed, and the party excepting might assign for error any opinion so excepted so. * * * This statute bestows upon this court the power to supervise every verdict that may be rendered in any of the courts of record of this State. * * * The policy of this legislative enactment has been, and may well be questioned, as it brings before a tribunal, other than a jury, that which, in the institution of trial by jury, was for their determination alone, that is, the facts of a case. An appellate court was, before the passage of that act,

judge of the law only, to decide wherein, in the case brought before it, the rules of law had been misapplied or violated. The old and honored maxim once was, 'the judges respond to the law, the jury to the facts,' but now, by this innovation, the judges of an appellate court have as much power over the facts as the jury had in the first instance, for it is undeniable this court may set aside a verdict if the facts fail to satisfy it of its propriety. This control, so bestowed upon this court, is unqualified and unlimited and therefore we say the verdict of every jury is subject to the control of this court. Yet, with a view to abridge this power very soon after the passage of the act, this court laid down certain rules by which it would be governed in disposing of such cases. The first case which came to this court, after the enactment of this statute, was the case of *Smith* v. *Schultz*, at December term, 1838, by appeal, (1 Scam. 490), where it was held, the court would not grant a new trial when, in its opinion substantial justice had been done though the law arising on the evidence would have justified a different result." Other cases decided under the act of 1837 recognized the power of the court, given by statute to review the evidence but the verdict in each case was permitted to stand for it was not considered to be against the manifest weight of the evidence. (*Allen* v. *Smith*, 3 Scam. 97; *Ellis* v. *Locke*, 2 Gilm, 459; *Evans* v. *Fisher*, 5 id. 569; *Dawson* v. *Robbins*, id. 72; *Mann* v. *Russell*, 11 Ill. 586; *Welden* v. *Francis*, 12 id. 460; *Bishop* v. *Busse*, 69 id. 403.) Since the adoption of the constitution of 1870 the Appellate Courts, in the exercise of their appellate jurisdiction, have reviewed the evidence in many cases and set aside judgments on the ground that the verdict was against the manifest weight of the evidence.

Frequent reference is made in the briefs to *Borg* v. *Chicago, Rock Island and Pacific Railway Co.*, 162 Ill. 348; *Mirich* v. *Forschner Contracting Co.*, 312 id. 343, and other cases of similar import. What was said in those cases is not controlling here for the question there under consideration involved the validity of statutes which authorized the Appellate Courts to review evidence, make findings of fact different from that found by the jury and to reverse the cause without remanding it. In the instant case, the statute does

not vest the Appellate Court with power to reverse for error of fact where the evidence is conflicting without remanding the cause for another trial.

Plaintiff contends that on all questions of fact where the evidence is conflicting the verdict of the jury can not be set aside as being against the weight of the evidence except by the court that tried the case, and asserts that such was the practice at common law. In view of this contention it becomes material to consider briefly the practice in such matters at common law, for the successive constitutions of this State have ever guaranteed the right of trial by jury and it has been repeatedly held by this court that the right of trial by jury means the right as was known at the common law and enjoyed at and before the adoption of the respective constitutions. *People* v. *Kelly*, 347 Ill. 221; *George* v. *People*, 167 id. 447.

At an early date in the development of the common law the courts were contered at Westminster. A suit was instituted by filing it in the court at that place. When it was ready for trial it was sent to the county where the cause of action arose. Jurors were summoned to appear in such county and the King commissioned one of the judges of the court at Westminster to try the case. These courts came to be known as courts of *assize* and *nisi prius*. The judge at *nisi prius* presided at the trial, received the verdict and returned the record with the verdict and the proceedings attached in the form of a *postea* to the court at Westminister. When the judge at *nisi prius* had received the verdict and returned the papers to Westminister his office as *nisi prius* judge in that case was *functus officio*, and his commission was exhausted. Thereafter, the record was reviewed by the court *en banc* at Westminister and judgment entered. Motions for new trial were made to the court at Westminister. (26 Yale I. J. p. 57.) At an early time the *nisi prius* judge certified his approval or dissatisfaction with the result of the verdict and it became a guide for the courts sitting *en banc* in Westminister. Forsyth, in History of Trial by Jury, at page 190, says: "When there is conflicting evidence it is not usual to grant a new trial unless the evidence for the prevailing party be very slight and the judge declare himself dissatisfied with the verdict."

The certificate of the *nisi prius* judge was not controlling, for in Bacon's Abridgment, volume 6, at page 654, it is said that the case of *Wood* v. *Gunstun*, decided in 1655, was the first case reported in the books wherein a new trial was granted, but that it ought not from thence to be concluded that this was the first instance of granting a new trial, for that the silence of reporters as to this matter may be in part due to its not having been formerly the practice to report what was done by courts upon motions; and on page 664 it is stated that a new trial was in some cases refused notwithstanding the verdict was, in the opinion of the judge before whom the cause was tried, contrary to the weight of the evidence.

In 3 Blackstone's Commentaries (Cooley's ed.) p. 387, it is said: "Formerly the principal remedy for reversal of a verdict unduly given was by writ of attaint, * * * but such a remedy as this laid the injured party under an insuperable hardship by making a conviction of the jurors for perjury the condition of his redress. The judges saw this and therefore very early, even upon writs of *assize* they devised a great variety of distinctions by which an attaint might be avoided and the verdict set to rights in a more temperate and dispassionate method. * * * If every verdict was final in the first instance, it would tend to destroy this valuable method of trial and would drive away all causes of consequence to be decided according to the forms of the imperial law, upon depositions in writing; which might be reviewed in a course of appeal. * * * Next to doing right the great object in the administration of public justice should be to give public satisfaction. * * * Granting a new trial under proper regulations * * * renders perfect that most excellent method of decision which is the glory of the English law. A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party, as if it had never been heard before. * * * A sufficient ground must, however, be laid before the courts to satisfy them that it is necessary to justice that the cause should be farther considered. If the matter be such as did not or could not appear to the judge who presided at *nisi prius*, it is disclosed to the court by affidavit; if it arises from what passed at the trial it is taken

from the judge's information; who usually makes a special and minute report of the evidence. Counsel are heard on both sides to impeach or establish the verdict, and the courts give their reasons at large why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colors are taken off, and all points of law which arose at the trial are upon full deliberation clearly explained and settled."

Bright v. *Eynon*, 1 Burrows, 391, decided in the King's Bench in 1757, was a motion for new trial upon which the judges gave their opinion granting the new trial. Lord Mansfield, at page 393, said: "Trials by jury in civil causes could not subsist now without power somewhere to grant new trials. If an erroneous judgment be given in point of law, there are many ways to review and set it right. When a court judges a fact upon depositions in writing, the sentence or decree may, many ways, be reviewed, and set right. But a general verdict can only be set right by a new trial which is no more than having the cause more deliberately considered by another jury, where there is a reasonable doubt or perhaps a certainty that justice has not been done. The writ of attaint is now a mere sound in every case. In many it does not pretend to be a remedy. There are numerous causes of false verdicts without corruption or bad intention of the jurors. They may have heard too much of the matter before the trial, and imbibed prejudices without knowing it; the cause may be intricate, the examination may be so long as to distract and confound their attention. * * * If unjust verdicts obtained under these and a thousand like circumstances, were to be conclusive forever, the determination of civil property in this method of trial would be very precarious and unsatisfactory. It is absolutely necessary to justice that there should upon many occasions be opportunities of reconsidering the cause by a new trial. * * * It is not true 'that no new trials were granted before 1655' as has been said from Style 466." After referring to *Slade's case*, which was in 1648, reported in Style 138, and to *Wood* v. *Gunston* (1655), Style 466, Lord Mansfield proceeds: "The reason why this matter can not be traced further back is that the old report

books do not give any accounts of determinations made by the court upon motion."

The rule laid down by Lord Parker in *Reg.* v. *Corporation of Helston*, 10 Mod. 202 was that the purpose shall be "doing justice to the party, or in other words, attaining the justice of the case. The reasons for granting a new trial must be collected from the whole evidence and from the nature of the case considered under all the circumstances."

There are statements in some of the later cases which support plaintiff's contention that at common law the power to award a new trial on the grounds the verdict was against the weight of the evidence, rested solely in the trial court. Such statements seem to be partially based on the theory that the trial judge saw and heard the witnesses testify and was for that reason in a better position to consider the evidence than the judges of a court of review who had not had such opportunity. As has been noted, at the early common law, motions for a new trial were addressed to the court at Westminster and not to the judge who presided at the trial. The judges of Westminster acted only on the record before them and, as Blackstone said, "it was clearly held that whatever matter was of force to avoid a verdict ought to be returned upon the *postea*." The judge at *nisi prius* was a member of the court at Westminster. The function of that court was to review the record and proceedings returned to it and determine whether judgment should be entered. Blackstone says, volume 3 at page 386: "If any defect of justice happened at the trial by surprise, inadvertance or misconduct, the party may have relief in the court above by obtaining a new trial." The judges of the court at Westminster had no opportunity of seeing the witnesses or hearing them testify. The credibility and weight of the evidence was determined from the records and proceedings before them.

From the authorities cited and others which have been examined, we conclude that there was a practice at common law which authorized courts exercising appellate jurisdiction to set aside verdicts on the grounds the findings of fact was not supported by the evidence. Such practice

has been authorized in this State by statute since 1837. Immediately following the adoption of the act of 1837, this court recognized that if a court of review was to exercise a power of supervision over verdicts and set them aside when considered as being against the weight of the evidence, it must be done judiciously and only under circumstances where the interests of justice demanded it. The same limitations on the power were recognized at common law. It is apparent that any other rule would constitute the judges of the reviewing court the trier of the facts and thus take from the parties their constitutional right to a trial by jury. In the exercise of the power conferred by the act of 1837, and during the time when appeals and writs of error were brought direct from the trial court to this court, certain definite rules were announced as a guide where verdicts were atacked on questions of fact. It was said the court would not disturb a verdict upon facts for any slight preponderance in testimony (*Bloomer* v. *Denman*, 12 Ill. 240; *Goodell* v. *Woodruff*, 20 id. 191;) but if there is a strong preponderance the verdict will be set aside, especially where apparent injustice has been done. (*Boyle* v. *Levings*, 24 Ill. 223 *Clement* v. *Bushway*, 25 Id. 182. Again, this court said a verdict will not be disturbed unless the finding is clearly wrong, (*French* v. *Lowry*, 19 Ill. 158; *Bush* v. *Kindred*, 20 id. 93; *Carpenter* v. *Ambroson*, id. 170; *Cross* v. *Carey*, 25 id. 461;) and where the evidence is conflicting the verdict will not be set aside even though it may be against the weight of the evidence, *Morgan* v. *Ryerson*, 20 Ill. 343; *Martin* v. *Ehrenfels*, 24 id. 187; *Pulliam* v. *Ogle*, 27 id. 189;) and in *Fish* v. *Roseberry*, 22 Ill. 288, it was held that the courts will seldom interfere with the finding of a jury in actions *ex delicto*. These cases are not referred to as being all-inclusive of the rules under which a verdict of a jury may be disturbed, but to illustrate the strict limitations under which the power should be exercised by an Appellate Court.

This court is without jurisdiction to determine whether or not the Appellate Court correctly analyzed the evidence. The principal question for determination was the constitutionality of the statute and that is decided in the affirmative.

Courts of review of other jurisdictions which have sustained statutes similar to the one in question are *Gunn* v. *Union Railway Co.*, 23 R. I. 289, 49 Atl. 999; *Smith* v. *Times Publishing Co.*, 178 Pa. St. 481, 36 Atl. 296; *Hintz* v. *Michigan Central Railroad Co.*, 132 Mich. 305, 93 N. W. 634.

For the reasons assigned, the judgment of the Appellate Court is affirmed.

Judgment affirmed.